No. 11658

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GLENS FALLS INDEMNITY COMPANY, a corporation,

Appellant,

vs.

BASICH BROTHERS CONSTRUCTION COMPANY, a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

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vs.

BASICH BROTHERS CONSTRUCTION COMPANY, a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

Jurisdictional Statement.

This is an appeal from a judgment at law of the United States District Court for the Southern District of California, Central Division, in favor of the plaintiff, Basich Brothers Construction Company, a corporation, and against the defendant Glens Falls Indemnity Company, a corporation, in the sum of $79,582.91, plus interest in the sum of $8,557.49 and costs of suit. [Tr. pp. 213-214.]

The District Court for the Southern District of California has jurisdiction of the action under Act of Congress, March 3, 1911, c. 231, Section 24; Section 24 (1) (b) of the Judicial Code, as amended. (28 U. S. C. A. 41 (1) (b).)

The amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00. [Tr. pp. 3, 89.]

The plaintiff is a California corporation. [Tr. pp. 2-3.] The defendant, Glens Falls Indemnity Company, is a New York corporation. [Tr. p. 3.]

The pleadings necessary to show the jurisdiction of the District Court are the Complaint [Tr. pp. 2-36], and the First Amended Answer. [Tr. pp. 89-145.]

The United States Circuit Court of Appeals for the Ninth Circuit has jurisdiction under Act of Congress February 13, 1925, c. 229, Section 1; Section 128 (a) (d) of the Judicial Code, as amended. (28 U. S. C. A. 225 (a) (d).)

The judgment of the District Court was entered on the 10th day of March, 1947. [Tr. p. 214.] On the 13th day of March, 1947, a stipulation between the parties hereto was filed with the Clerk of the District Court, after first being approved by a judge thereof, which allowed appellant until the 20th day of May, 1947, to post a Supersedeas Bond. On the 16th day of May, 1947, appellant filed its Notice of Appeal [Tr. p. 215] and posted a Supersedeas Bond approved by a judge of the District Court. The original transcript of record on appeal was certified by the Clerk of the District Court on the 13th day of June, 1947 [Tr. pp. 222-223], and was filed in the Office of the Clerk of this Court on the 17th day of June, 1947.

Statement of the Case.

This action was brought by appellee to recover from appellant, as surety, damages claimed to have been sustained by appellee as the result of an alleged breach of the obligations of a subcontract bond in which appellee was named as obligee, appellant as surety, and the subcontractor, Duque & Frazzini, as principal.

Prime Contract: On January 25, 1945, the United States of America, through its Engineering Department at Los Angeles, entered into a contract with Basich Brothers Construction Company (appellee) as prime contractor, whereby the contractor agreed to furnish materials, labor and equipment and construct certain airfield facilities at Davis-Monthan Field, Tucson, Arizona. [Tr. p. 542.] The prime contract provided by its terms that work be commenced on or before January 26, 1945 [Tr. p. 543] and be completed within one hundred thirty (130) days. [Tr. pp. 555, 548.]

Subcontract: On February 7, 1945, appellee, as prime contractor, and Duque & Frazzini, as subcontractor, entered into an agreement whereby said subcontractor agreed to furnish certain labor, materials, and equipment for the production of rock, gravel and sand to be used in the performance of the prime contract.

The subcontract provided, in substance:

> 1. That work should be commenced not later than February 19, 1945, and should be completed on or before June 3, 1945. [Tr. p. 19.] (Appellee interpreted the subcontract to require the commencement of production of material not later than February 19, 1945. [Tr. p. 463].)

2. That time was of essence of the agreement, and that it contained the whole and entire understanding of the parties thereto. [Tr. p. 31.]

3. That Duque & Frazzini erect two plants, each to produce 800 cubic yards of suitable material to be used in connection with the contract. [Tr. p. 25.] (Appellee interpreted the subcontract to require the construction of two plants, each to produce 800 cubic yards of material per day. [Tr. pp. 7, 463, 465, 472-473].)

4. That partial payments for work performed would be made by appellee on the basis of 90% of the estimates of the United States Engineers and 90% of useable materials in stockpile. [Tr. p. 23.]

5. That upon completion of the subcontract the remaining amount would be paid within thirty days. [Tr. p. 23.]

6. That the subcontractor would at his own expense provide workmen's compensation insurance in accordance with federal, state and municipal laws, and insurance against liability for injury to persons or property; that the subcontractor would promptly make payment to all persons supplying him with labor, materials and supplies for the prosecution of the subcontract work; that if the subcontractor failed to provide such insurance or make such payments when due, such insurance might be provided and such payments made by the prime contractor and the amount thereof deducted from any money due the subcontractor. [Tr. p. 20.]

The subcontract is attached to the Complaint as Exhibit "A," and appears at pages 17-31 of the Transcript of Record.

On or about February 11, 1945, Duque & Frazzini commenced the erection of a small crushing plant at the site of the subcontract. [Tr. pp. 620, 770.] Appellee's general superintendent George W. Kovick was at the subcontract site known as the "pit," on that day and every day thereafter through February supervising work relative to the production of material. [Tr. p. 627.] No material was produced until some time after the 20th day of February, 1945. [Tr. pp. 571-572, 577, 597, 770-771.]

As of February 11, 1945, all employees of Duque & Frazzini were placed on the payroll of appellee. [Tr. p. 41.]

No payment became due to Duque & Frazzini under the terms of the subcontract until after the first estimate of production was made by the United States Engineers March 31, 1945. [Tr. pp. 23, 878.]

Appellee commenced making payments for the account of Duque & Frazzini beginning with the payroll for the period from February 11 to 17, 1945 [Tr. p. 41], and prior to March 31, 1945, had paid out thousands of dollars to or for the account of the subcontractor. [Tr. pp. 879, 41-63, 66, 71-73.]

Bond: Duque & Frazzini, as principal, and appellant, as surety, executed and delivered to appellee, as obligee, a bond dated February 20, 1945, conditioned for the faithful performance of the subcontract described therein. [Tr. pp. 32-36.]

The pertinent provisions of the bond read as follows:

> "NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, that if the Principal shall faith-

fully perform the work contracted to be performed under said contract, and shall pay, or cause to be paid in full, the claims of all persons performing labor upon or furnishing materials to be used in, or furnishing appliances, teams or power contributing to such work, then this obligation shall be void; otherwise to remain in full force and effect.

* * * * * * * *

PROVIDED, however, as to said Obligee, and upon the Express Conditions, the performance of each of which shall be a condition precedent to any right of recovery hereon by said Obligee:

FIRST: That in the event of any default on the part of the Principal, written notice thereof shall be delivered to the Surety, by registered mail at its office in the City of Los Angeles promptly, and in any event within ten (10) days after the owner, or his representative, or the architect, if any, shall learn of such default; that the Surety shall have the right, within thirty (30) days after receipt of such notice, to proceed or procure others to proceed with the performance of such contract; shall also be subrogated to all the rights of the Principal; and any and all moneys or property that may at the time of such default be due, or that thereafter may become due the Principal under said contract, shall be credited upon any claim which the Obligee may then or thereafter have against the Surety, and the surplus, if any, applied as the Surety may direct.

SECOND: That the Obligee shall faithfully perform all of the terms, covenants and conditions of such contract on the part of the Obligee to be performed; and shall retain the last payment payable by the terms of said contract, and all reserves and

deferred payments retainable by the Obligee under the terms of said contract until the complete performance by the Principal of said contract, and until the expiration of the time within which notice of claims or claims of liens by persons performing work or furnishing materials under said contract may be filed and until all such claims shall have been paid, unless the Surety shall consent, in writing, to the payment of said last payment, reserves or deferred payments." [Tr. pp. 32-35.]

The bond is attached to the Complaint as Exhibit "B," and appears at pages 32-36 of the Transcript of Record.

On March 7, 1945, the bond was amended to change the ten days appearing in Paragraph FIRST to twenty days. [Tr. p. 462.]

The bond was made, executed and delivered in California. The District Court therefore correctly held that this bond is governed by the law of California. [Tr. pp. 5, 91, 299, 303, 191.]

All of appellee's evidence on the point, as well as the deposition of Carson Frazzini, shows that Duque & Frazzini did not begin the production of material on February 19, 1945 [Tr. pp. 463, 471-472, 571-572, 577, 597, 770-771], nor until on or about the 25th day of February, 1945. [Tr. pp. 571-572, 577, 597, 770-771.] Even then, they failed to produce the minimum amount required by the subcontract, or as much as fifty per cent thereof. [Tr. pp. 463, 465-466, 472-473, 598, 628-629.]

Appellee, through its President, Nick L. Basich, and its General Superintendent, George W. Kovick had actual knowledge of these facts at all times. [Tr. pp. 597, 598, 627.]

The first intimation received by appellant that the subcontractor was not complying with its subcontract, was more than forty-five days after the production of material was to have been commenced, or some time subsequent to April 5, 1945. A copy of a letter dated April 5, 1945 addressed to Duque & Frazzini by appellee was sent to appellant, but it did not purport to be a notice of default. On the contrary, the letter demanded that Duque & Frazzini move in additional equipment and continue the work. [Tr. pp. 463-464.]

Appellee retained Duque & Frazzini on the subcontract work until June 8, 1945. [Tr. pp. 482-486, 491-493, 494-495, 661-663, 592-594, 831-832, 850.] As late as June 9, 1945, appellee addressed a letter to Duque & Frazzini demanding that they return to the work on or before June 15, and warning them that if they failed to do so, such failure would be deemed an act of default. [Tr. pp. 491-493.] At the time appellee wrote the letter of June 9, it had already taken over and was proceeding with the completion of the subcontract work. [Tr. pp. 831-832, 850-852, 433, 660-663, 671-672, 673, 593-594, 491-493, 494-495.]

Appellee at all times after February 11, 1945, when the work of erecting the equipment on the subcontract site commenced, carried all subcontract employees on its own payroll, and paid all wages and salaries direct to the employees performing the subcontract work with the regular payroll checks of appellee, which checks had no identification marks to distinguish them from the payroll checks of other employees on the prime contract. [Tr. pp. 637, 434-436, 846-847.]

Appellee named itself as employer of the men doing the subcontract work, in all withholding returns and withholding reports filed with the Internal Revenue Department, in all Arizona State Employment Insurance returns, in all Social Security returns and in all Workmen's Compensation and Public Liability Insurance policies. [Tr. pp. 638, 582, 322-323, 326-327, 436-438.]

Appellee rented from others, in its own name, equipment used on the subcontract work. [Tr. pp. 568, 332-346, 62, 66, 68, 69, 70, 71.]

Appellee set the rate of wages for the subcontract employees. [Tr. pp. 617, 786.]

Appellee dictated the site from which the subcontract materials were to be taken. [Tr. pp. 587, 25.]

Appellee supervised the work relative to the production of subcontract materials. [Tr. p. 627.]

Appellee made certain repairs to equipment on the subcontract work, over the protests of Duque & Frazzini. [Tr. p. 807.]

Appellee countermanded certain orders of Duque & Frazzini to subcontract employees, and assumed control of subcontract work over the protests of the subcontractor. [Tr. pp. 656-659, 605-607.]

Appellee, without obtaining the consent of the subcontractor, entered into a contract on or about June 1, 1945, with PDOC, in the sum of $2,500.00, to have a

crusher moved into the pit for the production of subcontract materials. [Tr. pp. 626, 433, 400.]

There is no evidence that appellant surety had any knowledge of these facts.

The subcontract provided for payment on the basis of cubic yards, measurements to be computed on truck water level. [Tr. p. 29.] Duque & Frazzini's production was measured by square yards and reduced to cubic yards. [Tr. p. 80.] Credits or payments were not based on truck water level measurement.

The subcontract set a 3″ maximum for rock furnished for Items 21 and 22 thereof. [Tr. p. 26.] On May 3rd, 1945, the maximum gradation was changed from 3″ to 1½″ by letter contract. [Tr. p. 876.]

There is no evidence that appellant surety had any knowledge of or consented to any alterations of the subcontract.

The amounts actually paid out for Duque & Frazzini by appellee were at all times greater than the amounts due Duque & Frazzini under ARTICLE XVI of the subcontract. [Tr. pp. 23, 11-12.] Appellee's complaint alleged that on or about June 8, 1945, it had paid out $36,456.41 more than the gross amount earned by the subcontractor. [Tr. p. 12.]

There is no evidence that appellant surety gave its consent, in writing or otherwise, to advances or premature payments by appellee to or for Duque & Frazzini.

Pleadings and Proceedings Herein.

Pleadings: The complaint of appellee, Basich Brothers Construction Company, based on one count [Tr. pp. 2-36], was filed the 27th day of December, 1945. It alleged a contract between appellee and the United States for certain construction work at Davis-Monthan Airfield at or near Tucson, Arizona. It further alleged a subcontract between appellee and Duque & Frazzini, a copy of which was attached to the complaint as Exhibit "A" [Tr. pp. 17-31], and a subcontract bond naming appellee as obligee, Duque & Frazzini as principal and appellant as surety, a copy of which bond was attached to the complaint as Exhibit "B." [Tr. pp. 32-36.]

The complaint alleged that Duque & Frazzini commenced the subcontract work on or about the 19th of February, 1945 and abandoned same on or about the 8th day of June, 1945 [Tr. p. 11]; that during said on or about the 8th day of June, 1945 [Tr. p. 11]; that during said period appellee paid out for labor, supplies, materials and equipment $36,456.41 in excess of the gross earnings under the subcontract [Tr. p. 12]; that after June 8, 1945 appellee completed the subcontract at a cost of $42,047.30 in excess of the gross earning based on the subcontract [Tr. pp. 14-15]; and that appellee had performed each and every act required of it under said subcontract and bond. [Tr. p. 15.] The prayer was for judgment for $78,503.71 with interest at 7% "from the date of said respective advancements" until paid. [Tr. p. 16.]

The first amended answer to the complaint [Tr. pp. 89-120] was filed on the 9th day of September, 1946. It denied that appellee had complied with the conditions

precedent in the bond, denied that appellee had complied with all the terms of the subcontract, denied that there was anything due appellee from appellant under the terms of the subcontract bond, and alleged as affirmative defenses that the complaint failed to state a claim against appellant [Tr. p. 99]; that appellee had failed to comply with any of the conditions precedent contained in the bond [Tr. pp. 99-109]; that appellee concealed from appellant surety the fact that the subcontractor was already in default at the time of the execution, delivery and acceptance of the bond [Tr. pp. 109-110]; that the subcontract was materially altered by appellee without the knowledge or consent of appellant [Tr. pp. 110-112]; that appellee made premature payments to or for the account of the subcontractor [Tr. pp. 112-113]; and that appellee, by taking complete possession of the subcontract work and proceeding to complete the same, elected to and did wholly waive its right to recover on the subcontract bond. [Tr. pp. 113-114.]

An amendment to the complaint [Tr. pp. 128-132] was filed on the 5th day of January, 1947. It alleged that after the execution of the subcontract Duque & Frazzini advised appellee that they were unable to meet the payroll to install and operate their plant and requested appellee to make such payments, and appellee did make said payments [Tr. pp. 128-129]; that appellee notified appellant on May 24th, 1945 that Duque & Frazzini were not paying the labor claims, that appellee had been paying for Duque & Frazzini claims for labor, material and supplies but that the amount under the subcontract was not sufficient to meet past advancements made by appellee. [Tr. p. 130.]

The amendment to the complaint further alleged that appellant did not notify appellee that it had no right to make payments in excess of the amount earned by Duque & Frazzini [Tr. p. 130]; that appellant did not notify appellee that it desired "to provide the means of fulfilling the requirements" of the subcontract [Tr. p. 131]; that by reason thereof appellant waived any right which it may have had for any failure of appellee to comply with the provisions of the bond or for any changes in the subcontract, and that appellant is estopped from asserting any rights it may have had for any failure of appellee to comply with any provisions of the bond or any changes in the terms of the subcontract. [Tr. pp. 131-132.]

An answer to the complaint as amended [Tr. pp. 133-145] was filed the 21st day of January, 1947. It denied that the payments made by appellee for labor and materials were made by it in compliance with provisions of the subcontract [Tr. p. 133], denied that appellant waived any rights which it had under the subcontract bond [Tr. p. 136], and denied that it is estopped from asserting any rights which it had by reason of the failure of appellee to comply with any of the provisions of the subcontract bond or because of any alterations of the subcontract. [Tr. p. 136.]

Appellee's bill of particulars [Tr. pp. 37-83] was filed July 1, 1946. [Tr. p. 83.] Amendments to the bill of particulars [Tr. pp. 120-123] were filed by appellee November 15, 1946. [Tr. p. 123.]

Pretrial: Pretrial hearings were held before the Hon. Peirson M. Hall on July 8, 1946 [Tr. pp. 224-243], and on October 14, 1946 [Tr. pp. 243-254] at which

time the case was submitted on the depositions of Nick L. Basich and George W. Kovick, taken by appellant, the deposition of John H. Bray, taken by appellee, and the exhibits. [Tr. p. 251.]

At a further hearing before Hon. Leon R. Yankwich on November 7, 1946 [Tr. pp. 255-279] the case was again submitted on the same depositions and the same exhibits. [Tr. p. 278.]

At a further hearing before Hon. Leon R. Yankwich on November 25, 1946 [Tr. pp. 280-312], the submission was set aside and the case set for trial on February 4, 1947 "merely for additional testimony along the lines indicated." [Tr. p. 311.]

On January 20, 1947 appellee took the deposition of Carson Frazzini, one of the subcontractors [Tr. pp. 754-875], which deposition was introduced in evidence February 4, 1947. [Tr. pp. 312-313.]

Trial: After certain testimony was taken on February 4th and 5th, 1947 the case was submitted to Hon. Leon R. Yankwich on the depositions of Nick L. Basich, George W. Kovick, John H. Bray and Carson Frazzini, the exhibits, and the testimony in open court of George J. Popovich, Bart C. Woolums, Nickola L. Basich, and Lawrence H. Vernon. [Tr. p. 460.]

Findings of fact and conclusions of law were made and filed [Tr. pp. 193-211], and on the 10th day of March, 1947 judgment was entered for appellee in excess of the amount alleged in the complaint. [Tr. pp. 212-214.]

In the judgment appellee recovered $79,582.91, together with interest in the sum of $8,577.49, plus costs in the sum of $216.80. [Tr. pp. 213-214.]

Questions Involved.

The questions involved in this appeal are:

1. Does the complaint state a claim upon which relief can be granted?

2. Did appellee comply with all the conditions precedent contained in the bond?

(a) Did appellee give notice to appellant of defaults of Duque & Frazzini promptly, and in any event within twenty days after it learned of such defaults?

(b) Did appellee accord to appellant the right within thirty days after receipt of such notice to proceed or procure others to proceed with the performance of the subcontract?

(c) Did appellee faithfully perform all the terms of the subcontract on its part to be performed?

(d) Did appellee retain the last payment payable and all reserves and deferred payments which it was obligated to retain under the terms of the subcontract and the bond?

3. Did appellant waive compliance by appellee with conditions precedent contained in the bond?

4. Is appellant estopped from asserting the failure of appellee to comply with the conditions precedent contained in the bond?

5. Did appellee conceal from appellant surety the fact that Duque & Frazzini were already in default at the time the bond was accepted?

6. Was the subcontract altered without the knowledge and consent of appellant?

(a) Did appellee have control of, and did it control, the manner in which the subcontract work was performed?

(b) Did appellee pay to or for the account of Duque & Frazzini sums in excess of those provided by the subcontract?

(c) Was Article XXIII, Item 11, of the subcontract altered to change the basis of payment to Duque & Frazzini?

(d) Was Article XXI, Section 7, of the subcontract altered to change the maximum size of rock to be produced?

7. Did appellee make premature payments to or for the account of Duque & Frazzini?

8. Did the fact that appellee proceeded with the subcontract work immediately upon the departure of Duque & Frazzini constitute an election to perform, and a waiver of any rights against appellant?

9. Is appellee entitled to interest on its unliquidated claim prior to judgment?

10. Did the trial court err in permitting witness George J. Popovich, over the timely objection of defendant's counsel, to testify from a summary of purported documents of which he had no personal knowledge, which documents were not in court and available to counsel for cross-examination and which were not shown to be admissible in evidence?

11. Are the obligations of appellant surety to be measured by the terms of the subcontract to which it was not a party, or are appellant surety's obligations solely those it undertook by virtue of its bond?

Specification of Errors.

Appellant specifies the following errors upon which it will rely in the prosecution of this appeal from the judgment of the District Court in this cause made and entered on the 10th day of March, 1947. Appellant specifies that the District Court erred in each of the following particulars:

1. The District Court erred in finding that the complaint states a claim upon which relief can be granted. [Findings XXIII and XXIV, Tr. p. 206.]

(a) The complaint, Paragraph XVI, alleges that during the period from on or about February 19, 1945 to on or about June 8, 1945 plaintiff paid out on subcontract work $36,456.41 in excess of the gross amount earned under the terms of the subcontract. [Tr. pp. 11-12.]

The subcontract, Article XVI, provides that "Partial payments for work performed under this agreement will be made by the Contractor on the basis of 90% of engineers estimate and 90% of useable materials in stockpile." [Tr. p. 23.]

It is shown, therefore, on the face of the complaint, that unauthorized and premature payments were made by appellee in the sum of $36,456.41.

2. The District Court erred in finding that appellee complied with all the conditions precedent contained in the bond. [Findings VII, X, XII, XIII, XIX, XXIII, XXV, XXVI, XXVII, XXVIII, Tr. pp. 197, 198, 199-200, 206-208.]

(a) The District Court erred in finding that appellee performed the condition precedent as to notice, which is set forth in Paragraph First of the bond. [Findings VII, X, XII, XIII, XXIII, XXV, Tr. pp. 197, 198, 199-200, 206.]

The evidence shows that the subcontractor was in default on February 19, 1945 and at all times thereafter, in that the subcontractor did not commence the production of material on the 19th of February, 1945 as required by the terms of the subcontract [Tr. pp. 463, 471-472, 571-572, 577, 597, 770-771], did not furnish the equipment required by the subcontract [Tr. pp. 463, 464, 465, 472], and failed to produce the minimum amount of material required by the subcontract. [Tr. pp. 463, 465-466, 472-473, 598, 628-629.]

The evidence further shows that the first knowledge or intimation received by appellant surety that the subcontractor was in default in the performance of the subcontract was contained in a letter addressed by appellee to Duque & Frazzini and a copy mailed to appellant at Los Angeles, which letter was dated April 5, 1945, more than forty-five days after the subcontractor's default on February 19, 1945. [Tr. pp. 463-464.]

The evidence fails to show that notice was ever given to appellant as required by the bond, although appellee at all times on and after February 19, 1945 had knowledge of the defaults of the subcontractor. [Tr. pp. 597, 598, 627, 629.]

(b) The District Court erred in finding that appellee complied with the condition precedent of the bond that "the Surety shall have the right, within thirty (30) days after receipt of such notice, to proceed or procure others to proceed with the performance of such contract;" as set forth in Paragraph First of the bond. [Findings VII, XIX, XXIII, XXVI, Tr. pp. 197, 203, 206-207.]

The evidence shows that appellee had already assumed control of the subcontract work before

the subcontractor left the job on June 8, 1945, and thereafter immediately proceeded with the completion of the subcontract. [Tr. pp. 433, 660-662, 852.]

(c) The District Court erred in finding that appellee performed the condition precedent set forth in Paragraph Second of the bond, that the obligee "shall faithfully perform all of the terms, covenants and conditions of such contract on the part of the Obligee to be performed;" [Findings VII, XXIII, XXVII, Tr. pp. 197, 206, 207-208.]

The evidence shows that appellee violated the terms of the subcontract, and particularly Article XVI thereof, by paying to or for the subcontractor on account of the subcontract work, large sums of money in excess of 90% of engineers estimates and 90% of useable materials in stockpile, and further violated said subcontract, and particularly Article XI thereof, by paying to or for the account of the subcontractor, on account of the subcontract work, large sums of money in excess of moneys due under the subcontract. [Tr. pp. 11-12, 879.]

(d) The District Court erred in finding that appellee complied with the condition precedent set out in Paragraph Second of the bond, that the obligee "shall also retain the last payment payable by the terms of said contract, and all reserves and deferred payments retainable by the Obligee under the terms of said contract, * * * unless the Surety shall consent, in writing, to the payment of said last payment, reserves or deferred payments." [Findings VII, XXIII, XXVIII, Tr. pp. 197, 206, 208.]

The evidence shows that appellee failed to retain said last payment, and failed to retain all or any reserves or deferred payments retainable by appellee under said subcontract, but on the contrary, paid to or for the subcontractor, on account of the subcontract work, large sums of money in excess of moneys due under the subcontract. There is no evidence that appellant consented to said payments. [Tr. pp. 11-12.]

3. The District Court erred in finding that appellant waived compliance by appellee with conditions precedent in the bond. [Finding XXXIII, Tr. p. 210.]

This finding is unsupported by the evidence.

There is no evidence to show or even indicate that appellant, intentionally or otherwise, relinquished any of its rights under the bond. [Tr. p. 504.]

4. The District Court erred in finding that appellant is estopped from asserting the failure of appellee to perform the conditions precedent contained in the bond. [Finding XXXIV, p. 211.]

This finding is unsupported by the evidence.

There is no evidence of any act, declaration or omission on the part of appellant which was acted on by appellee to its injury or otherwise.

5. The District Court erred in finding that appellee did not conceal from appellant the fact that the subcontractor was in default at the time the bond was accepted. [Findings XXIII, XXIX, Tr. pp. 206, 208-209.]

The evidence shows that the subcontractor was in default when the bond was accepted [Tr. pp. 571-572, 770-771, 41, 879], and that the first knowledge appellant had of any default of the subcontractor was

contained in the letter of April 5, 1945 from appellee to Duque & Frazzini, a copy of which was mailed to appellant. [Tr. pp. 463-464.]

6. The District Court erred in finding that the subcontract was not altered without the knowledge or consent of appellant. [Findings XXIII, XXX, Tr. pp. 206-209.]

The evidence shows that the subcontract was materially altered, particularly in the following respects:

(a) Appellee had control of, and did control and supervise, the manner in which the subcontract work was performed. [Tr. pp. 627, 41, 434-436, 638, 582, 322-323, 326-327, 436-438, 656-659, 605-607, 807, 587, 25, 617, 787, 568, 334-337, 433, 400.]

(b) Appellee paid to or for the account of Duque & Frazzini sums in excess of those provided by the subcontract. [Tr. pp. 23, 11-12.]

(c) Article XXIII, Item 11, of the subcontract was altered to change the basis of payment to Duque & Frazzini. [Tr. pp. 29, 80.]

(d) Article XXI, Section 7, of the subcontract was altered to change the maximum size of rock to be produced. [Tr. pp. 26, 876.]

7. The District Court erred in finding that appellee did not make premature payments to or for the account of the subcontractor. [Findings XXIII, XXXI, Tr. pp. 206, 209.]

The evidence shows that appellee paid to or for the account of the subcontractor, on account of the subcontract work, large sums of money

(a) prior to the date when any moneys were due the subcontractor on account of the subcontract work [Tr. pp. 41, 878, 879];

(b) in excess of moneys then due the subcontractor on account of the subcontract work. [Tr. pp. 41, 878, 879, 11-12.]

8. The District Court erred in finding that appellee did not waive any of its rights, nor elect to perform nor perform, any act inconsistent with the conditions of the bond. [Findings XIV, XXIII, XXXII, Tr. pp. 200, 206, 209.]

The evidence shows that when the subcontractor left the job on June 8, 1945, appellee, who had already moved in other equipment, elected to and did, without interruption, proceed with the completion of the subcontract work, instead of according to the surety the right, as required by the bond, to proceed or procure others to proceed with the performance of the subcontract. [Tr. pp. 661-663, 671-673, 593-594, 831-832, 850-852, 493, 495.]

9. The District Court erred in awarding to appellee interest prior to judgment. [Tr. pp. 211, 213-214.]

The evidence shows that the claim of appellee was unliquidated prior to judgment and therefore could bear no interest.

10. The District Court erred in admitting testimony of witness George J. Popovich concerning items alleged by appellee to have been paid out by it in connection with the subcontract, when the witness had no personal knowledge concerning the items, and was testifying from a summary of the said items as set forth in the bill of particulars, which summary was compiled by someone else, and the purported documents from which the bill of particulars was compiled were not in court and available to counsel for cross-examination, and were not shown to be admissible in evidence. [Tr. pp. 317-405.]

The witness testified as follows:

"Q. Referring to your bill of particulars, Mr. Popovich, which was introduced in evidence, Schedule I, Payroll—Duque & Frazzini, from February 11, 1945 to June 9, 1945, showing a total of $38,979.65, subject to the corrections made this morning, will you state from what data or information that item was prepared? A. The items were prepared from weekly payrolls submitted by Duque & Frazzini." [Tr. p. 323.]

This line of testimony was objected to by counsel for defendant:

"Mr. McCall: That is objected to, as the payrolls themselves would be the best evidence.

The Court: In the Federal Court, if the payrolls are available, a person who had charge of them can summarize.

Mr. Monteleone: We have the originals; if Mr. McCall desires the originals, they are in court.

The Court: So long as the originals are available for inspection, it is not necessary to produce them.

Mr. Monteleone: They have been inspected by the auditor for the defendant on many occasions.

The Court: I will allow you then to refer to this as a summary, it being understood that the originals are present and available to counsel. That is the Federal rule, and has been for many years." [Tr. p. 323.]

The witness then testified from the bill of particulars concerning Schedules I to "XXXXIV," inclusive, in substance, as follows:

That the figures shown in the schedules were taken from weekly payrolls and daily time cards furnished by Duque & Frazzini, equipment time

cards kept by the operators of the equipment, equipment records and memorandums, books of original entry, engineers estimates and engineering records, invoices, stock memorandums and other records; that these records were kept in the ordinary course of business; that in his opinion the charges set forth in the schedules were reasonable; as to most of the schedules, that the equipment and materials were used exclusively on the subcontract job, and in relation to each schedule that from the records he would state that, subject to any corrections made by plaintiff's attorney that morning as to certain schedules, the amounts set forth in the bill of particulars were correct according to those records. [Tr. pp. 323-360.]

Following the direct examination, the witness under cross-examination testified that he never was on the job at Tucson, that Homer Thompson was field manager, that all of the testimony he had given was taken from someone else's records and records kept in the home office which in turn were taken from records furnished the home office by someone in Tucson, and repeatedly admitted that records from which the figures in the bill of Particulars concerning which he had testified, were compiled, were not present in court. This fact was also admitted by plaintiff's counsel and confirmed by the court. [Tr. pp. 360-401.]

11. The District Court erred in finding that the terms of the subcontract to be performed by Duque & Frazzini became a part of the obligations contained in the bond.

The obligations of appellant must be measured by the terms of the contract to which it was a party, and not by the terms of some other contract to which it was not a party.

ARGUMENT.

I.

The Complaint Fails to State a Claim Upon Which Relief Can Be Granted.

The complaint incorporates by reference the subcontract and bond [Tr. pp. 4-5], copies of which are attached to the complaint as exhibits. [Tr. pp. 17-31, 32-36.]

The bond, in Paragraph Second, provides, among other things, that as a condition precedent to any right of recovery on the part of the obligee, it must comply with the terms of the subcontract [Tr. p. 34], and retain the last payment payable and all reserves and deferred payments retainable by the obligee under the subcontract. [Tr. pp. 34-35.]

The subcontract, Article XVI, provides that

> "Partial payments for work performed under this agreement will be made by the contractor on the basis of 90% of engineers estimate and 90% of useable materials in stockpile." [Tr. p. 23.]

The complaint, in Paragraph XVI, alleges that between the time the subcontract work commenced and the 8th day of June, 1945, plaintiff paid out to or for the account of the subcontrator $36,456.41 in excess of the gross amount earned under the subcontract. [Tr. pp. 11-12.]

If appellee had paid only 90% of moneys earned by the subcontractor, and had retained the last payment and all reserves and deferred payments, it would have had on June 8, 1945 a surplus of money belonging to the sub-

contractor, instead of having paid $36,456.41 in excess of the gross amount earned under the subcontract.

Civil Code of California, Section 2819, reads as follows:

> "A surety is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the surety the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended."

In the case of *Pacific Coast Engineering Co. v. Detroit Fidelity & Surety Co.* (1931), 214 Cal. 384, 5 P. (2d) 888, under similar facts, the court said, in part:

> "In the present case, as we have seen, the plaintiff is relying and basing his right to recovery upon the $1000 payment to Worswick, which the plaintiff contends was made within the contract, and therefore premature, and the trial court so found. Under these circumstances and the law as so established, it must be held that the premature payment altered the obligation of the principal under the contract, and that the surety was exonerated." (See also cases therein cited.)

On the face of the complaint it is shown, therefore, that appellee made premature payments to or for the account of the subcontractor in the sum of $36,456.41, which premature payments were contrary to the terms of the subcontract and directly contrary to the express provisions of the bond, necessarily resulting in the exoneration of the surety.

II.

Appellee Wholly Failed to Perform the Express Conditions Contained in the Bond, the Performance of Each of Which Is Made a Condition Precedent to Any Right of Recovery Thereon by the Obligee.

(a) Appellee Failed to Comply With the Condition Precedent Specified in Paragraph First of the Bond, Which Required Prompt Notice to the Surety of Any Default on the Part of the Principal.

The pertinent part of the bond on the question of notice reads as follows:

> "First: That in the event of any default on the part of the Principal, written notice thereof shall be delivered to the Surety, by registered mail at its office in the City of Los Angeles promptly, and in any event within ten (10) days after the owner, or his representative, or the architect, if any, shall learn of such default;" [Tr. p. 34.]

On March 7, 1945, the bond was amended to change the ten days appearing in Paragraph First to twenty days. [Tr. p. 462.]

The subcontract, Article II, required that work be commenced not later than February 19, 1945 [Tr. p. 19], which requirement appellee interpreted as meaning the commencement of production of materials. [Tr. p. 463.]

The subcontract, Article XXI, Section 5, required that the subcontractor erect two plants, each to produce 800 cubic yards of suitable material [Tr. p. 25], which requirement appellee interpreted to mean 800 cubic yards per day. [Tr. pp. 7, 463, 472-473.]

The subcontract, Article XXV, provided that

> "It is mutually agreed that time is of the essence of this agreement, and that it contains the whole and entire understanding of the parties hereto, * * *." [Tr. p. 31.]

All of appellee's evidence on the subject is to the effect that the subcontractor did not commence the production of material on the 19th day of February, 1945 [Tr. pp. 463, 471-472, 571-572, 577, 597, 770-771], nor until some time after the 20th of February, 1945 [Tr. pp. 571-572, 577, 597, 770-771], did not erect two plants for the production of material [Tr. p. 465], and did not produce the minimum requirement of material under the subcontract, but produced less than fifty per cent thereof. [Tr. pp. 463, 465-466, 472-473, 598, 628-629.]

Carson Frazzini, whose deposition was taken by appellee, stated that production of material began about February 25th, 1945. [Tr. pp. 770-771.]

In his deposition, George W. Kovick testified that he was in the pit where the subcontract materials were to be produced, every day in February after the 11th, "Supervising work relative to the necessary production of material." [Tr. p. 627.] He did not remember when the first material was produced. [Tr. p. 627.]

Nick L. Basich, treasurer and vice-president, and after March, 1945, president, and in both capacities general manager of Basich Brothers Construction Company [Tr. pp. 559-560], testified in his deposition, taken by appellant, that Duque & Frazzini started operating the first plant between the 20th and 25th of February, 1945 [Tr. pp. 571-572, 577, 597], and that when he wrote the letter

to Duque & Frazzini of April 5, 1945 he knew of his own knowledge that Duque & Frazzini did not commence the production of material on February 19, 1945. [Tr. pp. 596, 597.]

The letter from appellee to Duque & Frazzini dated April 5, 1945 [Tr. pp. 463-464] listed three separate failures on the part of Duque & Frazzini, each of which constituted default in the performance of the subcontract, to wit:

(a) That they did not start producing material on February 19, 1945;

(b) That they did not have two plants, as required by the subcontract;

(c) That they had not averaged 800 cubic yards of material per plant per day.

In letter addressed to Duque & Frazzini and appellant dated April 27, 1945, appellee referred to the subcontract and the letter of April 5, 1945 and stated that the subcontractor had failed to prosecute the work continuously with sufficient workmen and equipment, and instead of producing 800 cubic yards of suitable material per day, each of said plants had produced less than fifty per cent thereof [Tr. pp. 464-467], and in letter of May 23, 1945, to the subcontractor and appellant, appellee stated that each of said plants was producing an average of only approximately 300 cubic yards per day, and that the subcontractor had failed to maintain sufficient workmen and equipment to insure the completion of the work as provided in the subcontract. [Tr. pp. 471-473.]

Appellee had knowledge of all these facts and circumstances every day on and after the 19th day of February, 1945 [Tr. pp. 621, 627, 574], yet the very first intimation received by the surety that the subcontractor had not commenced the production of material within the time required by the subcontract, and had not erected two plants for the production of material as required by the subcontract, and had not produced the amount of material required by the subcontract, was when it received a copy of letter dated April 5, 1945 addressed to Duque & Frazzini. [Tr. pp. 463-464.] While this letter called the attention of Duque & Frazzini to their failure to commence the production of material as provided in the subcontract, and their failure to perform according to the terms of the subcontract, it did not purport to be a notice of default, but demanded that Duque & Frazzini move in additional and suitable equipment in order to produce the amount called for in the contract.

The law is clearly to the effect that where, as here, the bond expressly stipulates that the giving of prompt notice by the obligee of any default on the part of the principal shall be a condition precedent to any liability of the surety under the bond—no recovery can be had when the obligee fails to give such notice.

Civil Code of California, Section 2837, provides:

> "In interpreting the terms of a contract of suretyship, the same rules are to be observed as in the case of other contracts. Except as provided in section 2794, the position of a surety to whom consideration moves is the same as that of one who is gratuitous."

The question of notice was exhaustively considered in the case of *National Surety Co. v. Long* (C. C. A., 8th Cir.—1903), 125 Fed. 887. After reciting facts which showed that notice was not given in compliance with the terms of the bond, the court said, in part:

> "The covenant of the plaintiff in the case under consideration was to immediately notify the surety company of any failure or inability of the contractor to construct and complete the building at the time and in the manner specified in the contract, and the question was not whether or not, although he failed to give the notice, he had exercised ordinary care to do so, but whether or not he had actually given the notice immediately upon the appearance of the known inability and failure of the contractor to perform his agreement.
>
> * * * * * * * *
>
> The agreed time for the completion of the building was September 1, 1901. At that time the contractor had failed and was unable to perform his agreement in the time and manner there specified, and the plaintiff knew it. The latter had agreed, in such a case, to immediately notify the surety company of these facts, but he failed to do so until September 12, 1901. This failure was a clear breach of his covenants. 'Immediately' means without the intervention of other event; forthwith; directly. A notice 11 days after the known failure of a contractor to complete the performance of his agreement is not an immediate notice thereof, and it is not a compliance with the covenant and condition embodied in this contract. Streeter v. Streeter, 43 Ill. 155, 165.
>
> * * * * * * * *

The plaintiff had covenanted with the surety company in the bond that in the event of such inability or failure he would immediately notify the defendant, in writing, of that fact. He failed to fulfill this condition precedent to the liability of the company. That company was the surety of the contractor. If a condition of the liability of a surety known to the obligee is not complied with, the surety is discharged.

* * * * * * * *

Again, this bond contains the mutual covenants of the parties—covenants by the surety company that Humphreys, the principal, should construct the building, and keep it free from liens; covenants by the plaintiff that, if Humphreys was unable or failed to perform the contract in the time and manner therein specified, he would immediately notify the surety, and that the latter might then take the contractor's place. The plaintiff failed to keep his covenant before the surety company had in any way failed to comply with those which it had made. On this account, he cannot enforce the fulfillment of the covenant of the defendant. He who commits the first substantial breach of a contract cannot maintain an action against the other contracting party for a subsequent failure on his part to perform. (Several cases cited.)

The plaintiff failed to comply with the conditions precedent upon which he knew and upon which he had agreed that the defendant contracted to be bound, and he committed the first substantial breach of the contract between them. On account of these facts, he was not entitled to recover anything of the defendant, under the evidence in this record, and the jury should have been instructed to return a verdict in favor of the surety company."

The case of *Union Indemnity Company v. Lang, et al.,* (C. C. A., 9th Cir.—1934—Cal.), 71 F. (2d) 901 is the leading case in this jurisdiction on the subject of conditions precedent contained in a surety bond. After reviewing the facts, very similar to the facts in this case especially on the question of notice, the court said, in part:

> "Exactly one month before the appellees sent the first notification to the appellant that the subcontractor was not fulfilling its contract, Howard Lang, according to his own testimony, saw that Smith and McComber's welding equipment was not, in his opinion, 'sufficient to do three-quarters of a mile of welding per day on this 22 inch line.'
>
> This was not a mere vague impression entertained by Lang, but was supported by definite data: 'Smith and McComber had one tractor, a caterpillar tractor, but it had no crane or boom attachment on it with which to handle this pipe. In completing the welding work on Section 2 of the line, Lang Transportation Company used two 60 Best Caterpillars, and even that was not sufficient to enable the reasonable completion of three-quarters of a mile of welding of that 22 inch pipe per day.'
>
> But the amazing record of the appellees' failure to disclose the facts to the surety company antedates even Lang's observation of the subcontractor's deficiencies as to welding equipment.
>
> Lang testified:
>
> 'No welding work was performed by the subcontractors on Section 2 of the line during the month of April, 1929. They started to work in the early part of May and they started pretty slow. We kept after them. Of course we figured they were just get-

ting organized and they were still going pretty slow. Every time I was there I was just right after them to speed it up. * * *'

Again Lang testified:

"So we knew every day how much welding Smith and McComber had done. My father and I were in touch with the engineer for Pacific Gas and Electric Company, and, too, we had a general superintendent. * * *

We observed the organization which Smith and McComber had for doing the work, and the dispatch with which they prosecuted the work during the month of May. Their progress was slow. We noted that. And their organization seemed to be loose. * * *.'

Yet for more than five weeks from April 29, 1929, the day on which the subcontractor should have commenced its welding work, the appellees said not a word to the appellant.

It is contended, however, that 'The surety has not shown that it has been prejudiced in any way whatsoever because the appellees did not give notice prior to June 7, 1929.'

It therefore becomes necessary to inquire whether or not, when seasonable notice is made a condition precedent to the Surety's liability, the fact that the surety was not prejudiced by its failure to receive such notice is material. * * *

Early in the history of California jurisprudence, the Supreme Court of the state indicated its adherence to the principle of *strictissimi juris* in construing contracts in the nature of suretyships. In Bensley v. Atwell, 12 Cal. 231, 239, 240, the court said: 'Courts do not make contracts for men. They are supposed to be able to make contracts for themselves;

and we do not see, if a man chooses to bind himself to pay money on a particular event why he may not, also, as well give character to that event, and mark and describe it, and hold himself only bound by or after the event so defined; or, in other words, why, if he were only bound, upon eviction of his grantee, to pay money, he may not, by express agreement, limit the obligation to an eviction after reasonable notice to him. * * *

Nor does it matter of what value this notice was to the defendant, or whether it was of any value. In a Court of law, effect is to be given to the bargain according to its terms, and Courts of law cannot speculate upon the weight attached to one or another of the elements of an obligation. * * *'

In Schwab v. Bridge, 27 Cal. App. 204, 206, 207, 149 P. 603, 604, the doctrine of *strictissimi juris* with reference to conditions precedent as to notice and other matters, was emphatically elaborated upon by the court: * * *

'* * * it is equally true that parties to a contract may, if they think proper, agree that any matter shall be a condition precedent; and if words are used in the contract so precise, express, and strong that such intention only is compatible with the terms employed, a court can only give effect to such declared intention of the parties. The only question in every case is whether such intention is so declared; and where such intention is sufficiently expressed to make the fulfillment of the act a condition precedent, it will be one. 2 Elliott on Contracts, Sec. 1580; National Surety Co. v. Long, 125 Fed. 887, 60 C. C. A. 623.' * * *

We believe that the decisions of the highest courts of California have recognized the principle of

strictissimi juris in connection with notice of default, breach, or any act or omission that might cause a loss for which the surety might become liable, regardless of whether or not the surety has been in fact prejudiced by failure to receive such notice.

Since, therefore, the appellees were well aware of the various acts and omissions of the subcontractor that might cause a loss for which the surety might become liable and for five weeks failed to notify the surety of such acts and omissions, we hold that the appellees failed to comply with a condition precedent of the bond, and cannot recover thereon."

(b) Appellee Failed to Comply With the Condition Precedent Specified in Paragraph First of the Bond, That in the Event of Any Default on the Part of the Principal, and Notice Thereof, the Surety Should Have the Right Within Thirty Days After Receipt of Such Notice, to Proceed or Procure Others to Proceed With the Performance of the Contract.

Appellee contended that the subcontractor was not in default until on or about the 8th day of June, 1945. [Tr. pp. 239-240, 304-305.] Before that date appellee had already taken over the subcontract work and proceeded with its completion without interruption. [Tr. pp. 433, 660-662, 831-832, 852.]

The case of *Southern Surety Co. v. Chris Irving Plumbing & Heating Co.,* 184 Pac. 356 (Colo.—1919), involved a bond which gave the surety, in case of any default, the "right to assume and complete or procure the completion of said contract." No such right was accorded in that case, and the court said:

"That is not a mere technical violation of the bond; it is a substantial wrong. Possibly the surety

might have completed the work at less expense than was incurred for that purpose. Having deprived the surety of that right, secured by the agreement, defendant in error is in no position to demand reimbursement for the funds it paid out to complete the contract."

(c) Appellee Failed to Comply With the Condition Precedent Specified in Paragraph Second of the Bond, Which Required:

"That the obligee shall faithfully perform all of the terms, covenants and conditions of such contract on the part of the Obligee to be performed;" [Tr. p. 34.]

1. Appellee failed to perform the provisions of Articles XVI and XI of the subcontract [Tr. pp. 23, 21] by paying to or for the account of the subcontractor in excess of 90% of engineers estimates and 90% of useable materials in stockpile, and in excess of moneys due under the subcontract. Paragraph XVI of the complaint alleges that during the period from the commencement of the subcontract work on or about February 19, 1945 to on or about June 8, 1945, appellee paid out for labor, supplies, materials and equipment $36,456.41 in excess of the gross earnings under the subcontract. [Tr. pp. 11-12.]

2. Appellee failed to perform the provisions of Article XXI of the subcontract, and particularly Section 7 thereof, which reads in part:

"Rock furnished for Items 21 and 22 shall be 3" (three-inch) maximum; prices furnished by Duque & Frazzini on these Items are predicated on the 3" maximum rock." [Tr. p. 26.]

by changing the maximum size of rock from 3" to 1½", without the knowledge or consent of appellant surety. [Tr. p. 876.]

3. Appellee failed to perform the provisions of the subcontract, Article XXIII, Section 11, which required measurements to be computed on truck water level. [Tr. p. 29.]

The Bill of Particulars, Schedule XXXIX, shows that Duque & Frazzini's production was measured by square yards and reduced to cubic yards. [Tr. p. 80.] Credits or payments were not based on truck water level measurement.

(d) Appellee Failed to Comply With the Condition Precedent Specified in Paragraph Second of the Bond, Which Required That the Obligee Retain the Last Payment Payable and All Reserves and Deferred Payments Retainable by the Obligee Under the Terms of the Subcontract:

On this point, the bond provides:

> "That the Obligee * * * shall retain the last payment payable by the terms of said contract, and all reserves and deferred payments retainable by the Obligee under the terms of said contract until the complete performance by the Principal of said contract, and until the expiration of the time within which notice of claims or claims of liens by persons performing work or furnishing materials under said contract may be filed and until all such claims shall have been paid, unless the Surety shall consent, in writing, to the payment of said last payment, reserves or deferred payments." [Tr. pp. 34-35.]

A letter addressed by appellee to Duque & Frazzini and appellant May 24, 1945, reads, in part, as follows:

> "* * * the amount of moneys due the subcontractors is not sufficient to meet the past advancements made by the contractor Basich Brothers Construction Company;" [Tr. p. 475.]

It is alleged in the complaint, Paragraph XVI, that as of June 8, 1945, appellee had paid out to or for the account of the subcontractor $36,456.41 in excess of the gross amount earned under the subcontract. [Tr. pp. 11-12.]

There is no evidence to show that appellant consented, in writing or otherwise, to the payment to or for the subcontractor of the last payment or any reserves or deferred payments.

In *Schwab v. Bridge,* 27 Cal. App. 204, 149 Pac. 603, the court said:

> "While it is true that conditions precedent are not favored by the law, and are to be strictly construed against one seeking to avail himself of them (Antonelle v. Lumber Co., 140 Cal. 309-315, 73 Pac. 966), it is equally true that parties to a contract may, if they think proper, agree that any matter shall be a condition precedent; and if words are used in the contract so precise, express, and strong that such intention only is compatible with the terms employed, a court can only give effect to such declared intention of the parties. The only question in every case is whether such intention is so declared; and where such intention is sufficiently expressed to make the fulfillment of the act a condition precedent, it will be one. 2 Elliott on Contracts, §1580; Nat. Surety Co. v. Long, 125 Fed. 887, 60 C. C. A. 623."

III.

Appellant Did Not Waive Its Right to Plead or Assert Any Failure of Appellee to Comply With Any of the Conditions Precedent Set Forth in the Bond, Nor Is Appellant Estopped From Pleading or Asserting the Failure of Appellee to Comply With Any of Said Conditions Precedent.

The evidence shows that the only representative of appellant who made any investigation was John Bray, from appellant's Los Angeles Office. His investigation was subsequent to April 5, 1945, after receipt of the first letter from appellee [Tr. pp. 463-464] intimating any failure of the subcontractor to comply with the terms of the subcontract.

Commenting on appellee's claim of waiver, predicated chiefly on the investigation made by Mr. Bray subsequent to April 5, 1945, Hon. Leon R. Yankwich, at the hearing on November 25, 1946 stated:

> "Mr. Bray was merely an investigator. He was not an officer; he was not a person who entered into the contract, or modified the contract. He merely was somebody who went there to see something and report; so that is all the evidence there is upon which an alleged waiver is based." [Tr. pp. 307-308.]

There is nothing whatsoever in the evidence to support the finding of the court that appellant waived any right under the bond, nor is there any evidence to show that it is estopped from asserting its rights thereunder. At no time in the course of the proceedings was appellee misled or lulled into a false sense of security by reason of any conduct of appellant.

The evidence shows that appellee refused to comply with appellant's request for information under date of ~~it is estopped from asserting its rights thereunder. At~~ June 7, 1945 in response to claims of appellee that Duque & Frazzini were not complying with the terms of the subcontract. [Tr. pp. 479-481, 497-499.]

The evidence further reveals that on June 7, 1945, appellant addressed a letter to appellee, through its attorney, which reads, in part, as follows:

> "You of course realize that your client has no right to charge anything to the Surety, as the Surety has no liability whatever except such liability as may exist under the express terms of its bond." [Tr. p. 480.]

On June 23, 1945 appellant again wrote appellee:

> "If you have wrongfully taken the contract over, as is indicated by your letters, or if you have failed to give notice required by the terms of the contract bond, or if you have failed in any other respect to perform any of the conditions precedent required of you by the terms of the bond, you can have no valid claim against the surety." [Tr. p. 504.]

It is apparent that appellee realized that its failure to comply with the conditions precedent contained in the bond precluded it from recovery thereunder, and attempted, as a last resort, to claim a waiver or an estoppel on the part of appellant. However, elements constituting either a waiver or an estoppel are entirely non-existent and are neither pleaded nor proven.

In an effort to circumvent appellant's defenses set forth in its first amended answer, appellee on January

5, 1947 filed amendments to its complaint, which amendments are set forth on pages 128 to 132 of the Transcript. The amendments to the complaint, by bald conclusions of law, assert that appellant waived any rights which it may have had by reason of any failure on the part of appellee to comply with the provisions of the bond. Also, by bald conclusions, the amendments to the complaint allege that appellant is estopped from asserting any rights it may have had by reason of the failure on the part of appellee to comply with provisions of the bond.

A cursory reading of the amendments to the complaint makes it at once apparent that neither a waiver nor an estoppel has been pleaded.

Appellant did not voluntarily nor intentionally relinquish any known right. In fact, it affirmatively communicated to appellee its intention to assert its legal rights.

In *McDanels v. General Insurance Co.,* 1 Cal. App. (2d) 454, 36 P. (2d) 829, it was contended that the defendant Insurance Company could not assert the defense of non-cooperation by its insured by reason of a purported waiver or estoppel. In rejecting such contention the court defines "waiver" as follows:

> "To constitute a waiver there must be an existing right, a knowledge of its existence, and an actual intention to relinquish it, or such conduct as warrants an inference of the relinquishment. It is a voluntary act and implies an abandonment of a right or privilege —an election to dispense with something of value or to forego some advantage which one might, at his option, have demanded or insisted upon. In no case will a waiver be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby, unless by his conduct

the opposite party has been misled, to his prejudice, into the honest belief that such waiver was intended or consented to. (25 Cal. Jur. 926-928.)"

See also:

Coolidge v. Standard Accident Insurance Co., 114 Cal. App. 716, 724, 300 Pac. 885 and cases cited.

In the present case, the conduct of appellant surety may not be construed to constitute a waiver. The intention of appellant to reserve its rights under the bond and its right to notice of any default as provided by the terms of the bond may not be doubted. The letters from appellant to appellee [Tr. pp. 480, 504] affirmatively stated that if appellee had failed in any respect to perform the conditions precedent required by the terms of the bond, it had no valid claim against the surety, and the conduct of appellant surety renders it indisputable that it did not intend to waive its rights under and pursuant to the terms of the bond.

Neither did appellant with full knowledge of essential facts which were unknown to appellee, conduct itself in such a manner as to deliberately mislead appellee. Hence, the elements of an estoppel are lacking.

The basis for the doctrine of estoppel is clearly set forth in *Lusitanian-American Development Company v. Seaboard Dairy Credit Corp.,* reported in 1 Cal. (2d) 121, at page 128, 34 P. (2d) 139, as follows:

"First: That the party to be estopped was apprised of the facts; second: That the party to be estopped must have intended that his conduct should be acted upon, and must have so acted that the party asserting the estoppel had a right to believe

it was so intended; third: That the party invoking the estoppel was ignorant of the true state of facts; and, fourth: That the party invoking the estoppel must have relied upon the conduct of the other party to his injury."

Applying the foregoing principles to the instant case, the first element is lacking because appellant was not apprised of the facts. The second element is lacking because there is no evidence that appellant conducted itself in such a way as to mislead appellee. The third element is lacking because appellee was not ignorant of the true state of facts, but on the other hand had superior and first-hand knowledge of the true state of facts. The fourth element is lacking because appellee was not in anywise injured by reason of any conduct on the part of appellant. In fact, any injury to appellee was the direct result of its own acts contrary to the terms of the subcontract.

To the same effect as the hereinabove quoted cases see:

Goorberg v. Western Assur. Co. (1907), 150 Cal. 510, 89 Pac. 130;

Aronson v. Frankfurt Accident & Plate Glass Ins. Co. (1909), 9 Cal. App. 473, 99 Pac. 537;

Rice v. Fidelity & Deposit Co. (1900), C. C. A. 8th Cir., 103 Fed. 427;

Southern Surety Co. v. Chris Irving Plumbing & Heating Co. (1919), Colo., 184 Pac. 356;

Bank of America v. Pacific Ready-Cut Homes, 122 Cal. App. 554, 10 P. (2d) 478;

Stern v. Sunset Road Oil Co., 47 Cal. App. 334, 190 Pac. 651;

Verdugo Canon Water Co. v. Verdugo, 152 Cal. 655, 93 Pac. 1021;

Hacker Pipe & Supply Company v. Chapman Valve Manufacturing Company, 17 Cal. App. (2d) 265; 61 P. (2d) 944;

Silva v. Linneman, 73 Cal. App. (2d) 971, 167 P. (2d) 794;

General Motor Acceptance Corporation v. Gandy, 200 Cal. 284, 253 Pac. 137.

IV.

Appellee Concealed From Appellant the Fact That Duque & Frazzini Were in Default at the Time the Bond Was Accepted.

The evidence shows that the bond was dated February 20, 1945 [Tr. p. 35]; that the bond was not accepted until some time after its date [Tr. pp. 660, 607-608]; that under the terms of the subcontract material was to be produced commencing not later than the 19th day of February, 1945 [Tr. p. 19]; that no material was produced on the 19th day of February, 1945 [Tr. pp. 571-572, 577, 597, 770-771]; that all of the employees on the subcontract work were placed on the payroll of appellee as of the 11th day of February, 1945 [Tr. p. 41], and that appellee made advancements to or for the account of the subcontractor, commencing with the payroll for the period from February 11 to 17, 1945 [Tr.

pp. 41, 879] although no money was due the subcontractor under the terms of the subcontract until some time after the engineers estimate on March 31, 1945. [Tr. p. 878.]

The evidence further shows that George W. Kovick, General Superintendent of appellee, was in the pit where subcontract material was to be produced every day in February on and after the 11th [Tr. p. 627]; that the letter addressed to Duque & Frazzini by appellee, a copy of which was sent to appellant April 5, 1945 [Tr. pp. 463-464] was the first intimation which reached appellant to the effect that Duque & Frazzini were in default, and that all the facts above mentioned were well known to appellee at the time it accepted the bond. It was appellee's duty to have made known to appellant all of these facts before accepting the bond.

It is a universal rule that all parties to a suretyship relation must act toward each other with the utmost good faith.

In *Damon v. Empire State Surety Co.,* 146 N. Y. Supp. 996, the court said:

> "At the same time it is well recognized that the obligee, before accepting the bond of the surety, is called upon to make such disclosure of facts within his knowledge, of which the concealment would amount to a *supresio veri,* and thereby become fraudulent, and it is not necessary that this concealment should inure to the benefit of the obligee, provided it operates to the prejudice of the surety."

The court in *Sherman v. Smith* (Iowa), 169 N. W. 216, in discussing such concealments, stated:

> "It is elementary that fraudulent concealments on material matters are equivalent to affirming a fact which does not exist. Story, Equity, sec. 215; 2 Kent's Commentaries, 483; Stearns on Suretyship, sec. 106. And the doctrine applies quite strictly in favor of sureties. 'Thus, if a party taking a guaranty from a surety conceals from him facts which increase his risk, and suffers him to enter into the contract under false impressions as to the real state of facts, such concealment will amount to a fraud, because the party is bound to make the disclosure, and the omission to make it under such circumstances is equivalent to an affirmation that the facts do not exist.' Burke v. Wonterline, 6 Bush (Ky.) 22."

In the old leading case of *Franklin Bank v. Cooper,* 36 Me. 179, the court uses the following language:

> "One, who becomes surety for another, must ordinarily be presumed to do so upon the belief, that the transaction between the principal parties is one occurring in the usual course of business of that description, subjecting him only to the ordinary risks attending it; and the party to whom he becomes a surety must be presumed to know, that such will be his understanding and that he will act upon it, unless he is informed, that there are some extraordinary circumstances affecting the risk. To receive a surety known to be acting upon the belief, that there are no unusual circumstances, by which his risk will be

> materially increased, well knowing that there are such circumstances and having a suitable opportunity to make them known and withholding them, must be regarded as a legal fraud, by which the surety will be relieved from his contract."

The *Restatement, Law of Security,* sets out the rule in Section 124:

> "Where before the surety has undertaken his obligation the creditor knows facts unknown to the surety that materially increase the risk beyond that which the creditor has reason to believe the surety intends to assume, and the creditor also has reason to believe that these facts are unknown to the surety and has a reasonable opportunity to communicate them to the surety, failure of the creditor to notify the surety of such facts is a defense to the surety."

Herein the evidence reveals that appellee accepted a bond from appellant without revealing that appellee had already breached the express conditions of the bond by making prepayments to or for the account of the subcontractor, and with full knowledge that the subcontractor had not started production on the scheduled date, and could not possibly fulfill the production requirements. Such concealments could only result in jeopardizing appellant's risk, and it is certain that had these facts been revealed, appellant would have rejected the undertaking. The situation is no different than that of a borrower procuring a loan without revealing to the lender liabilities which would render the loan hazardous.

V.

The Subcontract Was Altered by Appellee Without The Knowledge or Consent or Appellant.

(a) The evidence shows that appellee had control of and did control and supervise the subcontract work, in the following respects:

1. Appellee supervised the work relative to the production of material from the very beginning. George W. Kovick, general superintendent of appellee, testified in his deposition as follows:

> "Q. You say you were at the pit every day from February 11th during the month of February? A. Yes, sir.
>
> Q. What kind of work were you superintending out there during that time? A. The entire project, the production of material and all work performed on the airport itself.
>
> Q. But at and around the pit what kind of work were you performing? A. Supervising work relative to the necessary production of material." [Tr. p. 627.]

2. Commencing with the payroll of February 11, to 17, 1945, all employees of Duque & Frazzini were carried on the payroll of appellee. [Tr. pp. 41, 879, 86-88.]

3. Bills for labor, equipment, materials and supplies were paid with the checks of appellee, which checks bore no identification mark to show that they were anything other than the obligations of Basich Brothers Construction Company. [Tr. pp. 434-439.]

4. Appellee named itself as employer of the men doing the subcontract work, in all withholding returns and withholding reports filed with the Internal

Revenue Department, in all Arizona State Employment Insurance returns, in all Social Security returns, and in all Workmen's Compensation and Public Liability and Property Damage policies. [Tr. pp. 86-88, 638, 582, 322-323, 436-438.]

5. On or about the 19th day of May, 1945, a conflict arose between appellee and the subcontractor as to who had authority to lay off the men on the subcontract job or continue them at work. Carson Frazzini gave orders that the men be laid off until the following Monday morning. George W. Kovick, appellee's general superintendent, countermanded the orders of the subcontractor and instructed the men to continue work, which they did. [Tr. pp. 656-659, 605-607.]

6. Appellee made certain repairs to equipment on the subcontract work, over the protests of Duque & Frazzini. [Tr. p. 807.]

7. Appellee dictated the site from which the subcontract materials were to be taken. [Tr. pp. 587, 25.]

8. Appellee set the rate of wages for the subcontract employees. [Tr. pp. 617, 786.]

9. Appellee rented from others, in its own name, equipment used on the subcontract work. [Tr. pp. 568, 332-346, 63, 66, 68, 69, 70, 71.]

10. Appellee, without obtaining the consent of the subcontractor, entered into a contract with P. D. O. C. in the sum of $2,500.00, to have a crusher moved into the pit for the production of subcontract materials. [Tr. p. 433.]

In the case of *Stewart & Nuss, Inc. v. Industrial Accident Commission* (1942), 55 Cal. App. (2d) 501, 130 P. (2d) 985, the facts were very similar to the facts in this case.

In that case, there was a contract with the federal government for the surfacing and construction of a flying field. Stewart & Nuss, Inc., contracted with Dragline Rentals Co. to excavate sand. Stewart & Nuss, Inc., advanced each week to the Dragline Rentals Co. and amount equal to that company's payroll, such advancement to be deducted from any sums to become due the Dragline Rentals Co. Stewart & Nuss, Inc., kept a man at the sand pit to check the loads of gravel. Its foreman visited the pit several times a day, and all of the work was under the general supervision of an army engineer. Two of the men working at the pit were carried on the Stewart & Nuss, Inc., payroll. Time sheets were filled out for these men with the heading "Stewart & Nuss, Inc." left unchanged. The court said at page 988:

> "* * * a part of the evidence, with the reasonable inferences therefrom, supports the conclusion that Stewart & Nuss, Inc., in their zeal to keep the work going and possibly because of the absence of Kuhn from the scene of the operations during most of the time, did many things which were not strictly in accordance with the terms of the contract and that it actually assumed and exercised a measure of control which must be held to have modified the terms of the contract, so far as material here. As was said in Luckie v. Diamond Coal Co., 41 Cal. App. 468, 183 Pac. 178, 183; 'Accordingly, it has been held that, in an action of this character, while, *prima facie,* the relation of the parties to a written contract

> of employment is that which is expressed by the terms of their writing, nevertheless, in order to determine their true relation, such contract should be considered in view, not only of the circumstances under which it was made, but of the conduct of the parties while the work is being performed'."

(b) The subcontract, Article XVI, provides for partial payments for work performed "on the basis of 90% of engineers estimate and 90% of useable materials in stockpile." [Tr. p. 23.]

The evidence shows that appellee paid not only in excess of 90% of the amount so earned, but, according to the complaint appellee paid out between February 19, 1945 and June 8, 1945, $36,456.41 in excess of the gross amount earned under the subcontract. [Tr. pp. 11-12.]

(c) Appellee's own evidence shows that Section 11 of Article XXIII of the subcontract was altered to change the basis of payment. Whereas the subcontract required that measurement be computed on truck water level [Tr. p. 29], a different yardstick entirely was used by appellee, as shown by the bill of particulars. [Tr. p. 80.]

(d) The subcontract, Article XXI, Section 7, provided as follows:

> "Rock furnished for Items 21 and 22 shall be 3" (three-inch) maximum; prices furnished by Duque & Frazzini on these Items are predicated on the 3" maximum rock." [Tr. p. 26.]

On May 3, 1945, this section was altered to change the size of rock produced by the subcontractor from 3" to 1½" in a letter from appellee to Duque & Frazzini, and accepted by Duque & Frazzini. [Tr. p. 876.]

There is no evidence whatsoever that appellant consented to any of the above-mentioned alterations of the subcontract, or that appellant had knowledge of the said alterations.

The *Civil Code of California, Section 2819,* provides:

> "A surety is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the surety the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended."

The case of *United States v. Freel,* 186 U. S. 309, involved a change in the original contract. The court said:

> "However, the proposition that the obligation of a surety does not extend beyond the terms of his undertaking, and that when this undertaking is to assure the performance of an existing contract, if any change is made in the requirements of such contract in the matters of substance without his consent, his liability is extinguished, is so elementary that we need not cite the numerous cases in England and in the state and Federal Court establishing it. Many of these cases will be found cited in the opinion of Thomas, J., in this case. 92 Fed. Rep. 229.
>
> * * * * * * * *
>
> Coming then, to the question of the effect on the responsibility of the surety of the supplemental

agreement of August 17, we agree with the circuit court and the circuit court of appeals in holding that the alterations thereby caused were beyond the terms of the undertaking of the surety, and extinguished his liability.

* * * * * * * *

In Mundy v. Stevens, 9 C. C. A. 366, 17 U. S. App. 442, 463, 61 Fed. 77, it was held by the circuit court of appeals of the third circuit that sureties for the payment by a contractor to a subcontractor of all moneys received for work under a government contract as provided in the contract were released by an alteration of such agreement whereby the right secured to the contractors to deduct from the monthly payments 3 cents per yard for material dredged, subsequently was modified so that payments of 2½ cents per cubic yard should be made monthly; and it was also held that, as the plaintiff had set forth the supplementary agreement in his statement of claim, he thereby made it part of his case, and the burden of proof that the change was consented to by the sureties was upon the plaintiff."

In *First Congregational Church of Christ in Corona v. Lowrey,* 175 Cal. 124, 165 Pac. 440, it is stated:

"Because of this finding that these changes were neither material nor detrimental to the surety the trial court gave judgment for plaintiff, and this appeal has followed.

> * * * Our Code speaks with absolute finality upon the subject. Section 2819 of the Civil Code provides that a guarantor 'is exonerated, * * * if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect.' See, also, Civ. Code Sec. 2840, applying the same rule to sureties."

In the case of *McMannus v. Temple Estate Co.* (1936), 10 Cal. App. (2d) 419, 51 P. (2d) 1124, the court states:

> "It is settled, however, that the parties to an obligation cannot materially alter its definite terms without a guarantor's consent, even though such parties in good faith believe it is to the guarantor's advantage to make the alteration. We are not required and under the law are not permitted to speculate whether the alteration benefits or injuries the guarantor."

From the evidence herein, we find that not only was the subcontract altered without the knowledge or consent of appellant, by payment of moneys in excess of those provided therein, by changes in basis of payment and changes in size of material to be produced thereunder, but additionally we find that appellee, the obligee under the bond, actually stepped into the shoes of the subcontractor and occupied, as a practical matter, the dual position of a principal and obligee under appellant's bond.

Applying the foregoing statutory law to those facts, it necessarily follows that the surety was exonerated.

VI.

Appellee Made Premature Payments to or for the Account of the Subcontractor.

(a) The evidence shows that nothing became due under the subcontract until after the engineers estimate of March 31st, 1945. [Tr. pp. 23, 878.] The evidence further shows that appellee assumed payment for subcontractor's bills as of February 11th, 1945. [Tr. pp. 879, 41-57.]

At the hearing on November 25, 1945, addressing his remarks to plaintiff's attorney, Hon. Leon R. Yankwich said, in part:

> "* * * I call your attention to the fact that under the defenses made, the amount of monies paid out to and for the benefit of the subcontractor by the contractor is made the basis for one of the most strongly argued points of the defense, that there was no liability, and that is the question of premature payments. It is conceded that some $34,000.00 were prematurely paid; that is, that the payments exceeded 90 per cent, that at least $4,000.00 was paid long before any money was even due." [Tr. pp. 292-293.]

The record shows that $4,218.94 had been paid by appellee to or for the account of the subcontractor prior to March 7, 1945 [Tr. p. 879], that payments by appellee on account of the subcontractor's bills started as of February 11, 1945 [Tr. pp. 879, 41-44, 57], and before any payment whatsoever was due to the subcontractor, to wit, before March 31, 1945, thousands of dollars had been paid to or for the account of Duque & Frazzini. [Tr. pp. 879, 41-63, 66, 71-73.]

(b) The complaint, Paragraph XV, alleges that between the commencement of the subcontract work and

June 8, 1945, appellee paid out for labor, material, supplies and equipment on account of the subcontract work a total of $85,172.63 [Tr. pp. 10-11]; paragraph XVI of the complaint alleges that between the commencement of the subcontract work on or about February 19, 1945 and June 8, 1945, the total amount earned under the subcontract was $48,716.22, and that the difference between the amounts paid out by appellee and the gross amount earned by Duque & Frazzini during the said period was $36,456.41. [Tr. pp. 11-12.]

In a *per curiam* opinion of the Supreme Court of California (1931), the question of premature payments was extensively reviewed in the case of *Pacific Coast Engineering Co. v. Detroit Fidelity & Surety Co.,* 214 Cal. 384, 5 P. (2d) 888. The plaintiff in that case contracted with Worswick to furnish labor and material for a memorial auditorium. The defendant wrote a bond for the faithful performance of the contract by the principal Worswick. The contract between plaintiff and Worswick provided that 75% of the valuation of all work installed should be paid monthly by plaintiff. The plaintiff advanced $1000 to the principal who was in need of funds. The principal defaulted. The court said:

> "The plaintiff completed Worswick's contract, expending a sum greatly in excess of the original contract price, and sued the defendant in this action on its bond. The trial court found, among other things, that prior to the abandonment by Worswick of his contract the plaintiff had paid to Worswick at least 75 per cent of the value of the work completed under the contract up to that time and the plaintiff had complied in all respects with its obligations under said contract; that the plaintiff, in accordance with the contentions, and

evidence produced in support thereof, had advanced to Worswick the sum of $1,000 without a certificate of work done, for the purpose of enabling said Worswick to carry on his work under the contract; and that it was not true that said contract had been canceled or rescinded. Judgment for the plaintiff in the sum of $5,000 and interest was entered."

Among the defenses introduced by the Surety was the following:

"* * * that the $1,000 note transaction between Worswick and the plaintiff, without the knowledge or consent of the defendant, exonerated the defendant from any liability under its bond."

On this point the court said:

"The defendant contends that it is established by the authorities cited by it that a premature payment is a material alteration of the contractual obligation which will exonerate the surety without any inquiry into the question whether the surety has been prejudiced thereby. It is the position of the plaintiff that there is authority in point in this state which establishes that the premature payment will not exonerate the surety if it has not prejudiced its rights.

The case first relied upon by the defendant is Calvert v. London Dock Co., 2 Keen 638, 48 Eng. Rep. Full Reprint 774, where the contractor abandoned the work and the obligee completed it and sued at law to recover from the contractor and his sureties. The sureties, by a bill in equity, sought to be relieved of liability under their bond on the ground 'that the

company (the obligee) until the entire performance of the contract, would have retained in their hands, so much of the contract price, as by the contract, they were entitled to retain, as a security for the performance of the rest of the contract; and that by advancing to Streather more than they were bound to do, the company deprived the plaintiffs of the benefit of that security, and thereby, in equity, released them from the bond.' It was there said: 'The argument however, that the advances beyond the stipulations of the contract were calculated to be beneficial to the sureties, can be of no avail. In almost every case where the surety has been released, either in consequence of the time being given to the principal debtor, or of a compromise being made with him, it has been contended, that what was done was beneficial to the surety—and the answer has always been, that the surety himself was the proper judge of that—and that no arrangement, different from that contained in his contract, is to be forced upon him; and bearing in mind that the surety, if he pays the debt, ought to have the benefit of all the securities possessed by the creditor, the question always is, whether what has been done lessens that security. * * * What the company did, was perhaps calculated to make it easier for Streather to complete the work, if he acted with prudence and good faith; but it also took away that particular sort of pressure, which by the contract, was intended to be applied to him. And the company, instead of keeping themselves in the situation of debtors, having in their hands, one-fourth of the value of the work done, became creditors to a large amount, without any security; and under the circumstances, I think, that their situation with respect to Streather, was so far altered, that the sureties must be considered to be discharged from their suretyship.'

In Bragg v. Shain, 49 Cal. 131, it was held that the use of some $5,000, out of a fund to be retained amounting to over $9,000, in paying off liens prior to the time when the obligee was authorized to do so, operated to release the surety, and a judgment against the latter was reversed. In a brief opinion the court expressly followed Calvert v. London Dock Co., *supra,* holding that the case before it was not distinguishable in principle from that case and Taylor v. Jeter, 23 Mo. 244. In the latter case the money required to be retained was paid prematurely directly to the contractor who failed to apply it to lien claims for labor and materials of which the obligee previously had notice. The court there relied on Calvert v. London Dock Co., *supra,* in affirming a judgment for the surety on the ground that 'the owner having notice of them (the liens), and paying what by the substantial terms of the contract he was entitled to retain until they were removed, voluntarily abandoned an ample fund, which, according to the conditions of the contract, was to accumulate in his own hands as the primary security for its due performance, and in which the surety had an equal interest with himself. He must, therefore, bear the loss occasioned by his own negligence or folly.' "

The opinion closed with the following statement:

"Under these circumstances and the law as so established, it must be held that the premature payment altered the obligation of the principal under the contract, and that the surety was exonerated."

VII.

Appellee Made an Election on or Prior to June 8, 1945 to Complete the Subcontract Work, Instead of Giving Notice to Appellant as Required in the Bond, and According It the Right to Proceed or Procure Others to Proceed With the Performance of the Subcontract.

If Duque & Frazzini were in default on or after the 19th day of February, 1945, and if appellee failed to give to appellant notice of such default as required by the terms of the bond, all of which appellant claims the evidence shows, the surety was exonerated.

Assuming, for the purpose of this argument only, that Duque & Frazzini were not in default prior to the 8th day of June, 1945, as contended by counsel for appellee at the pretrial hearing before Hon. Peirson M. Hall, on the 8th day of July, 1946 [Tr. pp. 239-240], and as contended at the hearing before Hon. Leon R. Yankwich on the 25th day of November, 1946, at which time the court, addressing appellee's attorney, stated, in part:

> "On the basis of allegation of certain facts in the case the defendants allege that they were in default. In your brief you take definitely the position that it was no default until there was an abandonment of the work; an abandonment on the 8th of June.
>
> Mr. Monteleone: I don't think there was a default. I took the position that there were partial defaults." [Tr. pp. 304-305.]

—assuming these facts to be true, appellee had the election, upon the default of Duque & Frazzini to immediately take over the contract and complete it, and thereby waive any recourse against the surety on the bond, or to prompt-

ly give notice to the surety under the terms of Paragraph First of the bond and accord it the right, within thirty days, to proceed or procure others to proceed with the performance of the subcontract. [Tr. p. 34.]

With these two alternatives before it, appellee elected to and did immediately take over and complete the subcontract work. [Tr. pp. 661-663, 671-673, 593-594, 831-832, 850-852, 493, 495, 497-499, 500-502.]

This act on the part of appellee was wholly inconsistent with any right which it could possibly have under the terms of the surety bond. Appellant was surety for the faithful performance of Duque & Frazzini, not for the faithful performance of appellee. In other words, appellee could not be both principal and obligee under the bond.

It will be noted that at the very time appellee sent to appellant the letters dated June 9, 1945 and June 11, 1945 [Tr. pp. 497-499, 500-502] appellee had, according to its own statements, already taken over the subcontract work. Those letters also show that appellee was cognizant of the rights of the surety under Paragraph First of the bond, and was wilfully violating those rights.

On June 23, 1945, appellant wrote to appellee, in part, as follows:

> "If you have wrongfully taken the contract over, as is indicated by your letters, or if you have failed to give notice required by the terms of the contract bond, or if you have failed in any other respect to perform any of the conditions precedent required of you by the terms of the bond, you can have no valid claim against the surety." [Tr. p. 504.]

Appellant contends that if appellee had any right to call on the surety under the terms of the bond on or about

June 8, 1945, it waived that right by electing to take over and complete the subcontract.

In the case of *Albert Lea Foundry Co. et al. v. Iowa Savings Bank of Marshalltown, Iowa,* 21 F. (2d) 515, 519, the court said:

> "A party cannot occupy inconsistent positions in the same matter. In Robb v. Vos, 155 U. S. 13, 15 S. Ct. 4, 39 L. Ed. 52, the court held that, when a party has two remedies inconsistent with each other, any decisive act by him, done with knowledge of his rights and of the facts, determines once and for all his election of his remedy. And in Thompson v. Howard, 31 Mich. 309, 312, it was held that, where a party once makes his election between inconsistent positions, he is thereafter precluded from going back and electing again."

The court said, in the case of *In re Miller Rose Co.,* 36 F. (2d) 203, 206:

> "Where one has two inconsistent remedies, he must make his election which one he will pursue, and, having elected may not have recourse to the other remedy."

Appellee had the right, under the bond, to notify appellant of any default by appellant's principal, whereupon appellant, if it so chose, could itself or through someone it selected, fulfill the performance under the subcontract. On the other hand, appellee could undertake to complete the work itself and forego any rights it might have under the bond. Appellee chose the latter course. Having made its election, appellee is in no position now to re-elect, ignore all conditions precedent, and seek monetary damages against appellant because its first election proved unwise.

VIII.

Appellee's Claim Was Unliquidated, and Could Not Bear Interest Prior to Judgment.

The evidence shows that appellee's claim was uncertain and unliquidated until the date of the judgment.

The verified complaint alleges that up to June 8, 1945 the earnings under the subcontract amounted to $48,716.22 [Tr. p. 11], and that up to that date appellee paid out for labor, supplies, materials and equipment on account of Duque & Frazzini $85,172.63 [Tr. p. 11], leaving a difference between said earnings and expenditures of $36,456.41. [Tr. p. 12.] The court found, that up to June 8, 1945 the earnings under the subcontract were $56,080.11 [Tr. p. 202], that up to June 8, 1945 appellee expended in performance of the subcontract work $85,946.50 [Tr. p. 202], leaving a balance due plaintiff of $29,866.39. [Tr. p. 203.]

The complaint further alleges that from June 8, 1945 to completion of the job appellee paid out $118,278.03 [Tr. p. 14], and that the earnings based on the subcontract during that period were $76,230.73 [Tr. p. 15], leaving a difference between said earnings and expenditures of $42,047.30. [Tr. p. 15.] The court found, that from June 8, 1945 to completion of the job appellee paid out $115,470.36 [Tr. p. 204], and that gross earnings based on the subcontract from June 8, 1945 were $65,753.84 [Tr. p. 205], leaving a balance due plaintiff of $49,716.52. [Tr. p. 205.]

The complaint alleges that the balance due appellee is $78,503.71, which is the amount prayed for. [Tr. p. 16.] Appellee's verified bill of particulars alleges a balance of $79,290.09. [Tr. p. 40.] The court found the amount

of the balance to be $79,582.91 [Tr. p. 206] after plaintiff had admitted in open court on February 4, 1947 errors and overcharges in the bill of particulars totaling hundreds of dollars. [Tr. pp. 314-317, 345-346.]

A letter addressed to appellee's attorney by appellant's attorney on October 8, 1946 [Tr. pp. 125-127] pointed out some of the inconsistencies and errors in appellee's verified bill of particulars, and at the next hearing in open court on October 14, 1946 appellee's attorney filed with the clerk what purported to be a reply to the letter of October 8, 1946, which admitted errors and overcharges in the bill of particulars. [Tr. pp. 127-128.]

A further memorandum pointing out many errors and inconsistencies in the bill of particulars [Tr. pp. 146-186] was served on appellee January 31, 1947 and filed on February 4, 1947. [Tr. p. 186.] In open court on February 4, 1947, appellee's attorney admitted errors and overcharges in the bill of particulars totaling hundreds of dollars [Tr. pp. 314-317], and appellee's witness George J. Popovich when he was being examined by appellee's attorney called attention to a further overcharge concerning the items shown in the bill of particulars of $21.00. [Tr. pp. 345-346.]

Among the items which appellee's attorney requested be eliminated from the bill of particulars was a claim for public liability and property damage insurance, which appears in Schedule VI of the bill of particulars as amended. [Tr. p. 121.] It is interesting to note that appellee withdrew its claim on this item only after the policy was demanded in Notice to Produce June 27, 1946 [Tr. pp. 84-86], further demanded on July 8, 1946 [Tr. pp. 225-227], its production ordered by the court July 8, 1946

[Tr. p. 235], again ordered by the court on October 14, 1946 [Tr. p. 248], and again on November 7, 1946 [Tr. pp. 276-277], and when it was finally produced, appellee's counsel admitted that it did not cover the subcontractor. [Tr. p. 317.]

The rule regarding allowance of interest is stated in the case of *Perry v. Magneson* (1929), 207 Cal. 617, 279 Pac. 650, as follows:

> "As to the time from which interest on the amount found due should have been allowed, respondent asserts that the trial court was correct in awarding interest from the date of the commencement of the suit, on the theory that the action was not one for damages but was upon an obligation to pay a sum certain, which obligation must be treated as any other instrument calling for the payment of money. The general rule is that interest is allowable from the time the sum in suit becomes due, if the sum is certain or can be made certain by calculation. The test, then, to be applied in the instant case is whether or not the sum found to be due was known and admitted by the appellant to be due to the respondent. (Gray v. Bekins, 186 Cal. 389, 399 (199 Pac. 767).) It is apparent that, until the trial court determined the cost of completing the building, based upon the reasonable value of the necessary labor and materials, the amount, if any, due from appellant to respondent upon the bond in question could not be fixed. Had the cost to respondent not exceeded the amount specified in the building contract for the completion of the work, the surety would not have been liable in any sum. * * * It was necessary, therefore, for the respondent to prove a loss before he would be entitled to recover on the bond; and it follows that,

until the amount of that loss should be determined by the judgment of the court, the claim was uncertain and unliquidated. As was said by this court in Cox v. McLaughlin, 76 Cal. 60, 67 (9 Am. St. Rep. 164), 18 Pac. 100, 104, 'The reason of such denial of interest is said to be that the person liable does not know what sum he owes, and therefore can be in no default for not paying. The damages in such cases are an uncertain quantity, depending upon no fixed standard, * * * and can never be made certain except by accord or verdict. As to such damages there can be no default, and hence the initial point at which to fix the starting of interest is wanting.' It follows, therefore, that respondent was not entitled to interest prior to the entry of judgment, and to that extent the judgment was erroneous."

And the court said in *Indemnity Ins. Co. of North America v. Watson, et al.* (1933), 128 Cal. App. 10, 16 P. (2d) 760, 765:

"The general rule with respect to the allowance of interest is that, where there is no contract to pay interest, the law awards interest upon money from the time it becomes due and payable, if such time is certain and the sum is certain or can be made certain by calculation. Gray v. Bekins, 186 Cal. 389, 399, 199 Pac. 767; Perry v. Magneson, 207 Cal. 617, 623, 279 Pac. 650; 14 Cal. Jur., p. 678. Having in mind the theory upon which the case was tried and the fact that with respect to certain items contained in the schedule of charges appearing in the com-

> plaint, the amounts of such items were in dispute, and the proof produced at the trial showed such amounts to be in excess of the amounts properly due, we have arrived at the conclusion that the court was justified in refusing to advise the jury that it might make an allowance for interest. The test to be applied is whether or not the exact sum found to be due was known and admitted by defendant to be due to plaintiff. Gray v. Bekins, *supra.* When this test is applied, it is apparent that not until the trial of the action was it ascertained or could it have been ascertained that a certain definite sum was due from defendant to plaintiff."

The court herein awarded monetary damages in excess of those sought in appellee's complaint. Additionally, the judgment provides interest on the sum of $29,-866.39 from June 8, 1945 and interest on $49,716.52 from September 25, 1945, to and including February 28, 1947, said interest amounting to the sum of $8,-557.49. The basis upon which the court determined the dates from which interest should run is not revealed in the record. Until the court did determine that the surety was liable on its undertaking, and further determined what items were properly chargeable against appellant surety, the claims remained unliquidated. The majority of the claims were based upon an alleged reasonable value, and under the established rules as exemplified by the aforequoted authorities, the judgment herein should not bear interest prior to the date it was rendered.

IX.

The District Court Erred in Admitting Testimony of George J. Popovich Concerning Items Alleged by Appellee to Have Been Paid Out by It in Connection With the Subcontract, When the Witness Had No Personal Knowledge Concerning the Items, and Was Testifying From a Summary of the Said Items as Set Forth in the Bill of Particulars, Which Summary Was Compiled by Someone Else, and the Purported Documents From Which the Bill of Particulars Was Compiled Were Not in Court and Available to Counsel for Cross-Examination, and Were Not Shown to Be Admissible in Evidence.

All of the testimony of appellee's witness George J. Popovich [Tr. pp. 317-405] was based on a false foundation. He was permitted to testify from the bill of particulars over the objection of counsel for appellant, only after the witness and appellee's attorney had assured the court that the original payrolls were present and available to opposing counsel. This assurance was later proved to be erroneous.

The question, the objection, the comments and the ruling of the court therein appear in the record as follows:

> "Q. Referring to your bill of particulars, Mr. Popovich, which was introduced in evidence, Schedule I, Payroll—Duque & Frazzini, from February 11, 1945 to June 9, 1945, showing a total of $38,979.65, subject to the corrections made this morning, will you state from what data or information that item was prepared? A. The items were prepared from weekly payrolls submitted by Duque & Frazzini." [Tr. p. 323.]

This line of testimony was objected to by counsel for appellant:

> "Mr. McCall: That is objected to, as the payrolls themselves would be the best evidence.
>
> The Court: In the Federal Court, if the payrolls are available, a person who had charge of them can summarize.
>
> Mr. Monteleone: We have the originals; if Mr. McCall desires the originals, they are in court.
>
> The Court: So long as the originals are available for inspection, it is not necessary to produce them.
>
> Mr. Monteleone: They have been inspected by the auditor for the defendant on many occasions.
>
> The Court: I will allow you then to refer to this as a summary, it being understood that the originals are present and available to counsel. That is the Federal rule, and has been for many years." [Tr. p. 323.]

It is evident that the witness would not have been permitted to testify regarding the items in the various schedules which made up the bill of particulars, if he had not misrepresented to the court that the originals were present. It was the attorney for appellee who stated that the originals were in court. The witness misrepresented the facts by his silence. It was the witness whom the court addressed as follows:

> "I will allow you then to refer to this as a summary, it being understood that the originals are present and available to counsel." [Tr. p. 323.]

It is also evident that the statements of counsel for appellee that the bill of particulars had been introduced

in evidence, and that the original documents had been inspected by the auditor for appellant on many occasions, were erroneous and not supported by the record.

After the ruling of the court, the witness proceeded to testify regarding the items making up Schedules I to "XXXXIV" of the bill of particulars, in substance, as follows:

> That the figures shown in the schedules were taken from weekly payrolls and daily time cards furnished by Duque & Frazzini, equipment time cards kept by the operators of the equipment, equipment records and memorandums, books of original entry, engineers' estimates and engineering records, invoices, stock memorandums and other records; that these records were kept in the ordinary course of business; that in his opinion the charges set forth in the schedules were reasonable; as to most of the schedules, that the equipment and materials were used exclusively on the subcontract job, and in relation to each schedule that from the records he would state that, subject to any corrections made by plaintiff's attorney that morning as to certain schedules, the amounts set forth in the bill of particulars were correct according to those records. [Tr. pp. 323-360.]

On cross-examination, the witness testified:

"Q. (By Mr. McCall): Mr. Popovich, were you ever on the job at Tucson, Arizona? A. No.

Q. Then all the information or testimony you have given here, you got it from records submitted to you by someone else, is that right? A. From someone else's records, and records we kept in the home office.

Q. And the records which you kept in the home office were in turn taken from records given to you

by somebody else in Tucson, is that right? A. Yes, and also submitted by the home office to Tucson." [Tr. p. 360.]

The witness further testified that he never saw time cards prepared by Duque & Frazzini, as he was never on the job [Tr. p. 368]; that Homer Thompson was manager of the field office. [Tr. p. 369.]

After the witness had testified that he had before him all the payroll sheets from January 29, 1945 to October 13, 1945, the date the job was finished [Tr. p. 361], he was requested to demonstrate to the court how the bill of particulars was made up from the records of appellee. To this he replied: "We don't have all the necessary data to do that." [Tr. pp. 384-385.] When the witness had for a long time evaded the questions of counsel for appellant, the court finally stated to him: "Counsel wants to know if you have any weekly sheet." [Tr. p. 389.] Counsel for appellee, without waiting for the witness to answer, said: "No, I don't think we have." [Tr. p. 389.] The Court then remarked: "Let us go on. It is quite evident he does not have all the information here." [Tr. p. 389.]

The following excerpts from the testimony of the witness further show that the documents of which the bill of particulars purported to be a summary, were not in court:

"Q. (By Mr. McCall): And that is the same with reference to the comment we have made on Schedule No. III, is it not? If you will refer to

your comments, Mr. Popovich? A. Yes, sir, that is true for No. III. We don't have all the records here with us.

Q. And also for No. IV, No. V? A. We don't have all the records here for IV or V." [Tr. p. 389.]

"Q. Beginning with Schedule No. VII of your Bill of Particulars, Mr. Popovich, Equipment Rentals, you testified this morning that those schedules were made up—Schedule No. VII was made up by equipment time cards signed by each employer.

Mr. Monteleone: Each employee. A. By each employee.

Q. (By Mr. McCall): And the time cards signed by him and the foreman. Do you have in court all the time cards making up Schedule No. VII? A. I don't have all the time cards here at all, sir.

Q. Do you have any time cards from which you made up Schedule No. VII? A. Not with us here." [Tr. p. 391.]

"Q. Beginning with Item 2/26/45, page 1 of your Schedule XXX, in the amount of $33.69, can you tell how that labor is made up? A. $33.69?

Q. Yes. A. We can tell that by our time cards, and other records we don't have here available.

Q. Do you have any records available in court today from which you made up Schedule No. XXX? A. We don't have all the records here.

Q. Do you have any of them here? A. No, we would have to have our work papers to compute that." [Tr. p. 396.]

No books or records of any kind from which the bill of particulars was purportedly compiled, were offered by appellee in evidence, or even for identification.

The applicable rule is tersely stated in the case of *People v. Doble,* 203 Cal. 510, 514, 265 Pac. 184, as follows:

> "It is manifestly error to admit in evidence, under section 1855, subdivision 5, of the Code of Civil Procedure, a summary of books where the books themselves are not shown to be admissible in evidence. We, of course, are not intending to hold that the books in each case must be actually received in evidence to warrant the introduction of such summary so long as they are available for use of the opposing party, but their introduction in evidence is the safest rule, and it is not a technical objection to require that a showing be first made that such book entries are entitled to admission if they are actually offered. This we understand to be the effect of such cases as Shields v. Rancho Buena Ventura, 187 Cal. 569 (203 Pac. 114).
>
> Further, it will be seen that a more serious error was committed when it is recalled that appellant was in nowise connected with the said entries, it being expressly admitted that he had no knowledge whatsoever of the books and had no custody or control whatsoever over them. The entries were not made by Cox and were therefore at most the acts of subagents and ordinarily would not be binding even in a civil action on appellant (Civ. Code, secs, 2349-2351)."

X.

The Obligations Assumed by the Surety Are to Be Measured Only by the Terms of the Bond to Which It Became a Party, and Not by the Terms of some Other Contract to Which It Was Not a Party.

That question was before this Court in the case of *Pacific Automotive Device Co. v. United States Fidelity and Guarantee Co.,* 15 F. (2d) 164, 165 (C. C. A., 9th Cir.—1926). In that case suit was brought against the surety on the contract alone. The Court said, in part:

> "* * * the contention that a surety on such a bond becomes a party to the original contract between the principal and the obligee in the bond and assumes all obligations of that contract, regardless of the conditions, provisions, and limitations contained in the bond or indemnity contract, finds no support in reason or authority. The contract of the defendant in error was one of indemnity only, and the obligation it assumed must be measured by the terms of the indemnity contract to which it was a party, not by the terms of some other contract to which it was not a party."

Conclusion.

More than six-sevenths of the record in this case is made up of depositions and exhibits, and this Honorable Court is in as good position to weigh and evaluate the evidence as was the District Court.

For the most part, the evidence is without conflict, and presents questions of law rather than questions of fact.

To recapitulate, the grounds upon which appellant urges that the judgment of the District Court be reversed, are:

1. The complaint clearly shows that appellee has no valid claim under the terms of the bond, upon which relief can be granted.

2. Appellee failed to comply with any of the express conditions contained in the bond, the performance of each of which was made a condition precedent to any right of recovery thereon by appellee.

3. Appellee failed to plead or prove facts constituting either a waiver on the part of appellant of the conditions precedent contained in the bond, or conduct on the part of appellant amounting to an estoppel to assert appellee's failure to comply with conditions precedent contained in the bond.

4. Appellee concealed from appellant material facts, which facts were known to appellee at the time it accepted the bond, and were unknown to appellant.

5. The subcontract was materially altered without the knowledge or consent of appellant.

6. Appellee made premature payments to or for the account of the subcontractor.

7. Appellee irrevocably elected its remedy, in undertaking to complete the subcontract itself rather than giving notice to appellant under the provisions set out in the bond.

8. The District Court erroneously awarded interest to appellee on an unliquidated claim, prior to judgment.

9. The District Court committed error prejudicial to the substantial rights of appellant, in permitting a witness

unfamiliar with the items, to testify from a summary, over timely objection, to items of account upon which the judgment was predicated, when the purported documents from which the summary was compiled were not in court and available to counsel for cross-examination.

For the foregoing reasons, appellant earnestly urges that the judgment of the District Court be reversed and the cause remanded to the District Court with instructions to enter judgment in favor of appellant.

Respectfully submitted,

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